JOHORE REPORT.

[ORIGINAL CIVIL JURISDICTION]
MILLS, J.
October 12, 1936.

ONG LOCK CHO
(Plaintiff)
v.
QUEK SHIN AND SONS LTD.
(Defendants).

[JOHORE BAHRU CIVIL SUIT No. 12 of 1936]

Estoppel by conduct—limits of the doctrine examined—where on the facts there is no estoppel a charge on land created by agent without authority is a forged charge and a nullity—The Land Enactment, 1910.

The plaintiff, who wished to borrow money on the security of land in Johore was taken by a broker to the office of a firm of Solicitors at Singapore. There he instructed Chan Su Hoon, the Chief Clerk of the firm of Solicitors to prepare a Charge embodying the agreed terms as to amount, interest and dates of payment: and for the purpose of preparing the Charge he allowed the Chief Clerk to retain possession of the title deed. The title deed was afterwards used to create a charge in favour of the defendant firm, and this charge was registered at Johore Bahru. The Chief Clerk was convicted of criminal breach of trust and of abetment of forgery in connection with the above transactions. The plaintiff brought an action to get the charge on the land set aside and for an order that the registration of the charge be set aside.

Held, (1) that the authority given by the plaintiff to Chan Su Hoon (assuming that he was an agent) was limited to the preparation of a charge by inserting certain particulars in a prescribed form and that every act of Chan Su Hoon in connection with the preparation and execution of the forged charge was entirely outside the authority given by the plaintiff.

Held, (2) that the forged charge was a nullity and must be set aside and the registration of it be cancelled. **Quah Hong Lian Neo v. Seow Teong Teck** (1936) 5 M.L.J. 203 approved and applied.

Cases referred to:—

(1) *Lickbarrow v. Mason,* (1787) 2 Term Reports.
(2) *Hunter v. Walters,* (1871) 7 Ch. App. 75.
(3) *London and South Western Bank v. Wentworth,* (1880) 5 Ex. D. 96.
(4) *Nash v. De Freville,* (1900) 2 Q.B. 72.
(5) *Brocklesby v. Temperance Permanent Building Society,* (1895) A.C. 173.
(6) *Farquharson v. King,* (1901) 2 K.B. 697.
(7) *Rimmer v. Webster,* (1902) 2 Ch. 163.
(8) *Fry v. Smellie,* (1912) 3 K.B. 282.
(9) *Meyer and Co., Ltd. v. Sze Hai Tong Banking Co., Ltd.,* 1913 A.C. 847.
(10) *Commonwealth Trust v. Akotey,* 1926 A.C. 72.
(11) *Quah Hong Lian Neo v. Seow Teong Teck,* (1936) 5 M.L.J. 203; 1 J.L.R. 108.

TRIAL OF SUIT.

Johannes and A. L. V. Davies for plaintiff.
R. L. Eber for Defendant.

Mills, J.—In this case I find the facts as follows.

On the 7th October, 1935, the plaintiff, who wished to borrow money on the security of his land in Johore, was taken by a broker, one Er Ah Huay, to the office of Messrs. Barrett & Co., Advocates and Solicitors, at Singapore. There the plaintiff saw the prospective lender (whose name he later ascertained to be Lin King Hing).

From the circumstances I think I must presume, and I therefore find, that the plaintiff and Lin King Hing discussed and agreed upon the terms of the proposed loan. The plaintiff then communicated the agreed terms to Chan Su Hoon, Chief Clerk of Messrs. Barrett & Co. that is to say, the loan was to be $10,000.00 interest was to be at the rate of 12% per annum; interest was to be paid monthly; and principal and outstanding interest were to be paid at the end of 6 months. The plaintiff instructed the Chief Clerk to prepare a Charge in the form prescribed by the Johore Land Enactment, embodying those terms. The plaintiff left his land grant in the possession of the Chief Clerk for the purpose of preparing the Charge: the Chief Clerk gave the plaintiff a receipt for the land grant. The plaintiff also left some quit-rent receipts with the Chief Clerk.

The Chief Clerk told the plaintiff that he would be notified when the charge was ready for execution.

On the 16th October the Chief Clerk asked the plaintiff to call at the office on the next day for the purpose of signing the charge and receiving the money.

On the 17th October, the plaintiff went to the Office at noon with one Ong Kim Hock.

After the Chief Clerk had asked the plaintiff to produce the receipt for the land grant, the plaintiff asked Ong Kim Hock to read out the contents of the receipt: when Ong Kim Hock had read a portion of it, the Chief Clerk snatched it from him: when Ong Kim Hock pressed for its return, the Chief Clerk said the lender wished to see it: Ong Kim Hock asked for

a copy, whereupon the Chief Clerk told another clerk to make a copy, but before the latter commenced to type it, the Chief Clerk took it and went downstairs, saying that he was going to leave the office and would shortly return.

Fifteen minutes later a telephone message was received, saying that the Chief Clerk would return to the office at 3 p.m.

The plaintiff and Ong Kim Hock returned to the office at 2.45 p.m. and were told that the Chief Clerk would not return to the office until the next day as his father was ill.

After telephoning, Ong Kim Hock and the plaintiff went to see Mr. Barrett at a little after 3 p.m.

After hearing them, Mr. Barrett asked them to return the next morning.

They went again the next morning, Mr. Barrett sent a messenger to fetch the Chief Clerk; as he did not arrive after they had waited an hour, the plaintiff instructed Mr. Barrett to stop all dealings in connection with his land grant.

At 11 a.m. the plaintiff made a report at the Detective Station.

I note that the plaintiff did not interview Mr. Barrett until a little after 3 p.m. on the 17th October, and did not go to Mr. Barrett's Office between the 7th and 17th October.

The plaintiff did not execute a charge in favour of the defendants, and did not receive any money from them. Meanwhile serious developments had taken place in a different part of the town.

About the 9th October, one Tee Jee Wan and another man approached the Managing Director of the defendant firm (whom I will call "the Director") for a loan of $12,000.00. They showed him a land grant, a quit rent receipt, and a Rubber Restriction document: they said the owner would charge the land as security for the loan. Tee Jee Wan's companion told the Director that the owner, Ong Lok Cho, had given him the land grant to show to the Director for the purpose of negotiating the loan.

This land grant was the plaintiff's land grant. The Director told them to return in a few days, by which time he would have inspected the land.

He inspected the land and was satisfied with the security.

The men returned on the 13th October and he told them that he would lend the money.

It was arranged that they should meet the next morning at the office of Messrs. Allen & Gledhill, Advocates and Solicitors, at Singapore.

They met there, and the Director saw a man whom he assumed to be Ong Lok Cho.

The terms of the charge were discussed and agreed upon in the presence of Mr. Munro, an Advocate and Solicitor. The Director wrote a cheque for $12,000.00 in favour of Messrs. Allen & Gledhill and handed it to Mr. Munro, who gave him a receipt.

Mr. Munro was informed that the Director did not know Ong Lok Cho personally.

A charge was executed on the 15th October in the presence of Mr. Munro, who complied with the provisions of the Johore Land Enactment as regards witnesses of identification. The charge was registered at Johore Bahru on the same day. I note that the Director was not present when the charge was executed and did not provide a witness to the identification of Ong Lok Cho: he did not see Ong Lok Cho and did not ascertain the identity of Ong Lok Cho: he left it to his solicitors to ensure the identity of Ong Lok Cho.

The charge, then, was executed by a person who was not Ong Lok Cho, the owner of the land.

The Chief Clerk, Chan Su Hoon, was arrested a few days later, and in 1936 was convicted of criminal breach of trust and of abetment of forgery, in connection with these transactions.

I now turn to consider the law.

The first point for consideration is whether the plaintiff is precluded from setting up his title.

Counsel for the defendant contends that the plaintiff is precluded on the principle "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it".

In support of his contention he relies on the following cases:—

Meyer & Co., Ltd. v. Sze Hai Tong Banking Co., Ltd.,[9]; *London and South Western Bank v. Wentworth*,[3]; *Nash v. De Freville*,[4]; *Commonwealth Trust v. Akotey*,[10]; *Hunter v. Walters*,[2] and *Fry v. Smellie*,[8].

I shall also have occasion to refer to the following cases:—

Brocklesby v. Temperance Permanent Building Society,[5]; *Rimmer v. Webster,*[7] and *Farquaharson Brothers & Co. v. King & Co.,*[6].

The legal position is not free from difficulty: the broad principle laid down in *Lickbarrow v. Mason,*[1] is couched in these terms, "that wherever one of two innocent persons must suffer by the act of a third, he who has enabled such person to occasion the loss must sustain it"; but Lord Halsbury makes an important qualification when he frames it in these words. "When one of two innocent persons must suffer from the fraud of a third, he shall suffer who, by his indiscretion, has enabled such person to commit the fraud" (1902 A.C. at p. 332); further, it is not correct to say that the innocent person who has enabled a third person to occasion loss must in every case sustain the loss (1902 2 Ch. at p. 169); lastly Lord Cairns and Lord Macnaghten appear to have thought that there was no such principle at all (1902 A.C. at p. 337).

In view of this difficulty it appears to me impossible for anyone to study the question satisfactorily without reading the law reports themselves; I shall therefore refrain from making long quotations from the reports, and shall content myself with referring as briefly as is practicable to the pages which contain the decisions and *dicta* which appear to me important.

I now wish briefly to examine the cases above-mentioned.

(1) *Hunter's case*[2] X. executed a deed and signed a receipt containing an unmistakable representation of a matter of fact: Y. made undue use of the deed and receipt: loss arose thereby: Z. in the ordinary course of business, without any negligence or default, trusted to the documents which contained the representations: *Held,* X. who made the representations must bear the consequences of these representations.

(2) *London and South Eastern Bank's case*[3]. When a bill is accepted in blank for the purpose of being negotiated, the acceptor is precluded, as against a *bona fide indorsee* for value, from proving that the drawing or indorsement is a forgery. In many similar cases the liability of the acceptor had rested upon the ground of estoppel: but Pollock B. and Hawkins, J. preferred not to use the word estoppel, and based their decision on the *Lickbarrow v. Mason* principle: they remarked that the principle had always been upheld in observations on the case of *Young v. Grote* (at pp. 104—5). In *Arnold v. Cheque Bank* (1 C.P. p. 578) Lord Coleridge, C.J., and Archibald and Lindley, JJ. state that the real basis of the decision in *Young v. Grote* was negligence, and they qualify the *Lickbarrow v. Mason* principle by adding "that the neglect must be in the transaction itself and be the proximate cause of leading the party into that mistake; and also must be the neglect of some duty that is owing to the person led into that belief": (at pp. 586—8). In Halsbury's *Laws of England.* (Second Edition). Vol. XIII: pp. 490—1, the decision in the *London and South Western Bank's* case is treated as resting on estoppel.

(3) *Nash's case*[4]. X. made three promissory notes in favour of Y. and passed them to him, on Y's promising not to negotiate them: Y., in violation of his promise, passed them to Z: *Held,* Z. were entitled to recover and X. was precluded, as against Z., from setting up Y's promise not to negotiate the notes.

A. L. Smith, L.J. decided the case on the rights of the parties under the Bills of Exchange Act (at p. 82), and though he mentions the *Lickbarrow v. Mason* principle (at p. 83), he does not, if I understand the judgment aright, make it the basis of his decision in accordance with the *Lickbarrow v. Mason* principle, and that the doctrine of estoppel governs it (at p. 86): I understand him to hold that the estoppel was raised on account of the principle: the "enabling" act in this case was handing over negotiable instruments as such ("a very different thing from depositing for safe custody securities capable of being negotiated").

(4) *Fry's case*[8] X. handed to Y. his agent a share certificate with a signed transfer, and authorized him to borrow not less than a certain sum: Y., in defiance of instructions, borrowed from Z. a less amount: *Held,* Z., as against X. was entitled to retain the *indicia* of title until repayment of the loan, and X. was precluded from proving the limitation on the agent's authority. Vaughan Williams, L.J. bases his decision on estoppel: X. had given his agent apparently unlimited authority, and he owed a duty to any lender to inform him of any limitation in the authority; as he did not perform that duty, X. is precluded from proving the limitation in the authority (at p. 292): the case of *France v. Clark* is distinguished on the ground that there the depositee was a mortgagee or pledgee and not an agent with limited authority (at p. 289): it is necessary to distinguish between an estoppel arising from a representation made in a document, and an estoppel arising from the relation of principal and agent (at p. 292): where this relation exists there is a duty on the principal to communicate

the limitation on the agent's authority (at p. 293): though the word "estoppel" covers the case (estoppel by representation), yet it is not, strictly speaking, estoppel by representation, but an application of the rule that the innocent person must suffer who, by trusting the agent, enables the fraud (at p. 293). Farwell, L.J. applies the principle stated by Lord Herschell, Lord Watson and Lord Macnaghten in *Brocklesby's case,* and followed in *Rimmer v. Webster* (at p. 294): if X's conduct amount to an invitation to Z. to lend money to Y. without limit on the title deeds of X's property, he is precluded from proving that he had imposed a limit on Y: the estoppel arises from X's conduct in making a representation: if X. simply deposited his deeds with Y, such deposit involves no such representation: estoppel by representation or equitable estoppel is a very old head of equity: the circumstances must necessarily "be such as to show a duty to some one to disclose fully on the person making the representation": if there is no duty to disclose there is no equity to remedy its non-performance: a man who simply deposits his deeds by way of equitable mortgage incurs no duty to third person because his deposit is no representation of anything beyond the existence of an equitable mortgage (at p. 295): in the cases of *France v. Clark* and *Fox v. Martin* there was no authority to borrow and therefore no question of estoppel in respect of the limitation of such authority (at p. 297). Kennedy, L.J. considers the case to be governed by the reasoning of the House of Lords in *Brocklesby's case* (at p. 298): the intention and purpose of the principal in placing the agent in possession of the documents is an all-important fact: the owner's own act in authorising the agent to deal with third persons creates, as against the owner, an equitable estoppel (at p. 299), and he is precluded from proving any limitation upon the authority to raise money: the burden of loss ought in equity to fall upon the innocent person who intended his agent to obtain money from the other party and clothed his agent with an apparently unqualified authority: in *France v. Clark* no such equitable estoppel could arise, because no authority was given by the plaintiff to the depositee to deal with the shares in any way or to create rights in other persons in regard to them, therefore, according to well-established legal principles, he who took these documents from the agents could take no better title than the agent had: what gives rise to an equitable estoppel is the essential fact of the owner's authority to the agent to raise money upon the documents (at p. 300).

(5) *Meyer's case*[9] X. held out Y. to Z. as having authority to collect the amounts of their bills by cheque, cash, or in any other way: *Held,* X. were precluded from proving, as against Z., that the apparent authority with which X. had clothed Y. was not his real authority.

The Privy Council considered that this was essentially a case in which the innocent person should suffer who by his conduct had enabled a third person to occasion the loss.

(6) *Commonwealth v. Akotey*[10] X. permitted goods to go into the possession of Y. with all the insignia of possession thereof and of apparent title; Z. bought them from Y. in good faith and for the full price: *Held,* as against Z., X. was precluded from setting up his title as owner of the goods. The Privy Council considered that this was a plain case for the application of the *Lickbarrow v. Mason* principle, and that to allow X. to prove his title "would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason*".

(7) *Brocklesby's case*[5] X. entrusted Y. with securities and entrusted him to raise a certain sum on them: Y. borrowed a larger sum from Z. (who knew nothing of the limitation), and fraudulently appropriated the difference: *Held,* as against Z., X. was precluded from proving any limitation in point of amount.

Lord Herschell, L.C., remarks that it is old law that mere possession of the title deeds, though lawfully acquired, will not of itself validate a security given by the possessor where the latter had no authority to use the deeds as security; but it is well established in equity that where the possessor has authority to raise money on the deeds, the owner is precluded from proving any limitation in point of amount as against the lender having no notice of such limitation: surely the person to suffer should be he who selected the agent, entrusted him with the deeds and trusted him not to exceed the limitation (at p. 183).

Lord Watson states that the principles of law to be applied are very plain: it is just and reasonable that since the agent had control of the securities for the purpose of borrowing, the lender (who has no notice to the contrary) should be entitled to deal with him on the footing that he had authority to pledge the securities to the full amount of their value: that is the rule in equity (at p. 183): though the respondents could take no benefit from documents which are tainted with the vice of forgery, yet forgery affords no reason for depriving them of any right in security not affected by that taint (at p. 184).

Lord Macnaghten says it would seem to be in accordance with common sense that the loss should fall on the principal who placed his title-deeds under the control of an agent and instructed him to procure a certain sum of money by means of them: he approves the principle that where a person permits his title deeds to be dealt with for the purpose of borrowing a definite amount, he is precluded from proving, as against innocent third parties who have lent money without notice of the limit, that the authority has been exceeded as to amount (at p. 184).

(8) *Farquharson's case*[6] X. authorized Y., their clerk, to make limited sales to their known customers: Y. under an assumed name fraudulently sold timber to Z. (who knew nothing of X. or of Y. under his real name): *Held*: that X. not having held out the clerk to Z. as their agents to sell to them (Z), were not estopped from denying the clerk's authority to sell; that the clerk, having no title or apparent authority, could not give any title to Z., and that X. could recover from Z. the value of the timber. Lord Halsbury, L.C. states that if X. had represented their clerk to be invested with authority to dispose of timber, and if Z., supposing the clerk to be invested with that power, had acted on this representation to their own prejudice, X. would have been precluded from denying that the clerk had authority (at p. 330): but Z. did not act upon the faith of the clerk being invested with authority (at p. 331): it is accurate to state this principle "when one of two innocent persons must suffer from the fraud of a third, he shall suffer who, by his indiscretion, has enabled such third person to commit the fraud": it is not correct to say that any person who has enabled another by any means to commit a fraud must be the person to suffer: there must be a breach of a duty (at p. 332): X. had not represented to Z. that the clerk had authority to sell (at p. 333). Lord Macnaghten rejects the defence that X. "enabled" the clerk to commit the fraud because they imposed a foolish confidence in him and gave him a written authority: the defence has no foundation in principle or authority (at p. 335): even where there is negligence it is not sufficient if it is only remotely connected with the wrongful act (at p. 336): there must be a duty (at p. 337): Lord Cairns has stated that where the House has to decide which of two innocent parties is to suffer by the fraud of a third, all the House has to do is apply the settled and well known rules of law and apply them vigorously (at p. 337).

Lord Lindley finds that X. did nothing which precluded them from denying the clerk's right to sell to Z.: "holding out" must be to the particular individual who says he relied on it, or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it (at p. 341): if taken literally the *Lickbarrow v. Mason* doctrine is clearly untrue; it is far too wide: it has never been judicially employed where nothing has been done by one of the innocent parties which has in fact misled the other (at p. 342): Z. were not in any way misled by any act of X. on which they placed reliance.

(9) *Rimmer's case*[7] X. delivered a mortgage bond to Y. with instructions to sell it: he also executed two deeds of transfer in favour of Y. Y. fraudulently borrowed money from Z. and executed a formal sub-mortgage of the bond to him, producing the transfer as proof of title: *Held*, as X. gave all the *indicia* of title to Y. with the intention that he should deal with the property, the principles of agency apply, and X. is precluded from proving as against an innocent purchaser or mortgagee without notice of a limit from the agent, any limit which he has imposed on his agent's dealing. Farwell, J. concurs with Vaughan Williams, L.J. who stated in *Farquharson's case* that it is impossible to say that in every case in which the act of one of two innocent persons has enabled a third person to occasion loss, the first-mentioned person must sustain the loss (at p. 169): the principle underlying certain cases is that the man possessed of the prior equity cannot be deprived of his title unless he has been guilty of some negligence; the word "negligence" imports the neglect of some duty towards the person injured: a man is entitled to deposit his title deeds with his solicitor without thereby giving rise to any implication inconsistent with his own beneficial title, and no other member of the community is entitled to allege that such a course of action contains any invitation to him to act, from which a duty to him can be inferred: but if it is once proved or admitted that it was the owner's intention that the depositee of *indicia* of title should deal with them, the case falls to be decided in accordance with the principles governing the cases of authority given by a principal to an agent; and the owner comes under a duty to the persons whom he intends to act on such authority to give them notice of any limit that he places on the authority which he has by his own act made apparently co-extensive with absolute ownership (at p. 172): the particular authority proved or admitted is necessary in order to make the case one to which the principles of agency apply at all: the cases of authority or agency fall under the general principle of *Lickbarrow v. Mason*: apart from that principle an owner is in

certain cases estopped from asserting his title, when he clothes a third person with the apparent ownership and right of disposition, not merely by making a transfer but also by acknowledging the payment of the consideration (at p. 173). So much for the cases: some of the pronouncements are not easy to understand and perhaps they are not entirely consistent.

I have to decide as a matter of law whether the principle enunciated in *Lickbarrow v. Mason* is correct, and if not, what qualifications are to be made.

The broad general principle was originally stated as follows:—

"Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it". In my opinion I am bound to come to the following conclusions:—

(1) The principle enunciated in the case of **Lickbarrow** v. **Mason** is not correct: it is too wide: and needs qualification.

(2) The intention and purpose of the principal in placing the agent in possession of the documents is an all-important fact: what gives rise to an equitable estoppel is the essential fact of the owner's own act in authorizing the agent to deal with third persons by obtaining money from them by means of the documents.

(3) No estoppel is raised unless there has been a representation.

(4) No estoppel is raised unless the circumstances necessarily show a duty to some to disclose fully on the person making the representation.

(5) No estoppel is raised unless the third person acted upon the representation and was misled by it.

What raises a doubt in my mind as to the law to be followed in the Colony is the expression used by the Privy Council in the *Commonwealth Trust's cases*: there the Privy Council held that the owner was precluded from setting up his title because to hold otherwise would be "inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason*". Does the Privy Council mean

(a) that the Council accepts without qualification the principle enunciated in **Lickbarrow v. Mason** or

(b) that the Council accepts the principle as qualified by the decisions of the English Courts?

I think the Council means the latter, for 2 reasons,

(i) The Privy Council does not say "the principle enunciated in **Lickbarrow v. Mason**":

(ii) I do not think the Privy Council would use this form of words if the Council intended to accept without qualification a principle which has several times been stated to be incorrect by the English Courts, including the Court of Appeal and the House of Lords.

My conclusion is that the law to be followed in the Colony is the law laid down by the House of Lords in *Brocklesby's case* and *Farquharson's case*, and by the Court of Appeal in *Fry's case* (approving the decision of Farwell, J. in *Rimmer's case*).

As a matter of public policy it is clearly desirable that the same law should prevail in Johore and I adopt that law accordingly.

I now endeavour to apply the law to the facts. It is said that the plaintiff is estopped by his conduct from setting up his title.

What was his conduct?

I have found as a fact that he instructed Chan Su Hoon, the Chief Clerk of Messrs. Barrett & Co. to prepare a charge embodying the agreed terms as to amount, interest, and dates of payment: and for the purpose of preparing the charge he allowed the Chief Clerk to retain possession of the title-deed.

No further authority was expressly conferred, and I do not think any further authority can be implied except perhaps to show the title deed to the lender if he wished to see it.

I am doubtful whether the plaintiff appointed either Messrs. Barrett & Co. or their Chief Clerk as his agent: it might be argued that the Chief Clerk, being ordered merely to insert certain details in a prescribed form is no more an agent than the petition-writer who is ordered to write, or the printer who is ordered to print, a draft letter. But for the purposes of determining the present case, it is not necessary for me to decide whether the plaintiff appointed Messrs. Barrett & Co. or their Chief Clerk as his agent, and I do not decide it. But, if it is assumed that the plaintiff appointed the Chief Clerk as his agent, what is the position?

Did the plaintiff authorize the agent to deal with third persons by obtaining money from them by means of his title-deed? He did not: and if this "essential fact" is absent no estoppel arises (1912, 3 K.B. at p. 300).

Did the plaintiff make any representation? He did not: the deposit of a title to supply details for the drafting of a charge is no representation of anything beyond the existence of an agreement to

execute a charge; just as the deposit of deeds by way of equitable mortgage is no representation of anything beyond the existence of an equitable mortgage: and if there is no representation, there is no estoppel (1912 3 K.B. p. 295).

Did the circumstances necessarily show a duty lying upon the plaintiff to disclose fully to the defendant? They did not: the plaintiff incurred no duty to the defendant, because the deposit of his title was no representation of anything beyond the existence of an agreement to execute a charge: and if there is no duty, there is no estoppel [(1912) 3 K.B. at p. 295 and 1902 A.C. at p. 332].

Did the defendants act upon any representation made by the Plaintiff and were they misled by it? They did not: they did not act upon the plaintiff's representation that there existed an agreement to execute a charge nor were they misled by that representation: and unless the third party acts upon the representation and is misled, no estoppel arises (1902 A.C. at pp. 333 and 342).

My conclusion is that the plaintiff is not estopped from setting up his title.

If the plaintiff may set up his title as true owner, I must hold that the forged charge is a nullity, following the decision in *Quah Hong Lian Neo's case*[11] that decision was not appealed against, and I must assume it is correct.

Counsel for the defendants accepts the correctness of that decision, but he seeks to distinguish the case on the ground that in the present instance the plaintiff "enabled" the commission of the fraud within the purview of the *Lickbarrow v. Mason,*[1] principle: I have already given my reasons for thinking that the facts of the present case do not fall within the scope of the qualified principle accepted by the English Courts.

Counsel for the defendants also pressed me to hold that the plaintiff is liable for the fraud of his agent, Chan Su Hoon, and the defendants' counter-claim is based on that liability.

He relies on the case of *Lloyd v. Grace, Smith & Co.* (1912 A.C. p. 716).

But that case is radically distinguishable.

The true principle is laid down by Lord Macnaghten in the House of Lords as follows "an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud".

The respondent firm was held liable for the fraud of their managing clerk because they authorized him to receive deeds and carry through sales and conveyances, and to give notices, the managing clerk committed a tortious act in conducting business which he was instructed to conduct on behalf of his principal; it was found as a fact that it was within the scope of his employment to advise clients who came to the firm to sell property as to the best way to do it and the necessary documents to execute (at pp. 724 and 730).

In the present case, on the other hand, I have found that the authority given by the plaintiff to Chan Su Hoon (assuming that he was an agent) was limited to the preparation of a charge by inserting certain particulars in a prescribed form: every act of Chan Su Hoon in connection with the preparation and execution of the forged charge was entirely outside the authority given by the plaintiff.

The Court has a discretion under the Specific Relief Enactment to grant or refuse the equitable relief asked for, but in my opinion no sufficient reason has been shown to justify the Court in refusing it.

I declare that the charge, registered as Presentation No. 72207, was not executed by the plaintiff and is a forgery.

I order that the charge be set aside.

I order that the registration of the charge be cancelled.

I order that the defendants deliver the charge to the Court for cancellation.

I order that the defendants deliver to the plaintiff Grant No. 16492 and the Assessment Receipt.

I dismiss the counter-claim.

I give liberty to both parties to apply.

One other question remains, whether the Court ought to order the plaintiff to repay to the defendants the sum advanced upon the charge.

In my opinion the answer must be in the negative, for 2 reasons:—

(1) in considering which of two innocent parties ought to suffer, I have decided that the claim of the plaintiff ought to be preferred: it would stultify that decision, if I now ordered the loan to be repaid, for such an order would remove the burden of suffering from the shoulders of the defendants and impose it on the shoulders of the plaintiff. In England, the defendants would have to bear the loss: as Farwell, L.J. says in **Fry's case**, if the owner of property has not in fact authorized any dealing with his property, the lender loses his money (1912, 3 K.B. at p. 294).

(2) the plaintiff admittedly has not been guilty of any negligence amounting to a neglect of duty and therefore ought not to be saddled with any responsibility for the loss which the defendants have incurred through the transaction: if the judgment of Innes, J.C. in **Lim Pang Geok's case** reported in **Innes**—a Short Treatise on Registration of Title in the Federated Malay States.

As to costs, I can see no reason why these should not follow the event: I therefore make a conditional order that the defendants shall pay the plaintiff's costs: this order will not become operative until 14 days after the judgment is read, and if within that time the defendants notify the Registrar that they wish the question to be argued, the Registrar is to set the case down for argument accordingly.

I have one thing to add: Counsel for the defendants has drawn my attention to the fact that in *Quah Hong Lian Neo's case*[11] the judgment stated that the concluding clause of Section 59 of the Land Enactment, 1910, was interpreted as a direction to the Court that when fraud is proved the Court must exercise its jurisdiction on the ground of fraud in the same manner as if the Land Enactment had not been passed: Counsel points out that where the Enactment expressly makes provision for cases of fraud, as for instance in Section 90 H. (i), the Enactment ought to be taken into consideration: he is quite correct: in the judgment in question it was of course taken as understood that express provisions of the Enactment must be regarded.

Order accordingly.